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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 511

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-35a) is not yet officially reported. The Board's decision and order (Pet. App. 1a-14a) are reported at 173 NLRB No. 117.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1969 (Pet. App. 35a-36a).[1] The petition

[1] On July 4, 1969, Mr. Justice Harlan denied petitioner's application for a stay of the judgment pending the filing and final determination of a petition for a writ of certiorari.

for a writ of certiorari was filed on August 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board properly concluded that the Company violated its bargaining obligation under the National Labor Relations Act by refusing to furnish the Union with the names and addresses of the non-union employees in the bargaining unit which it represents.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition (p. 2).

STATEMENT

Since 1959, petitioner Company has recognized the Insurance Workers International Union, AFL-CIO [2] as the exclusive bargaining representative of its district insurance agents in 34 States, the District of Columbia, and the City of Toledo, Ohio. During this period, the parties have entered into successive collective bargaining agreements, the most recent of which is effective until September 29, 1969 (Pet.

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[2] The Union was the charging party before the Board and intervened in the court of appeals proceeding; it is thus a party here.

App. 4a; A. 10).[3] The bargaining unit represented by the Union covers approximately 16,795 agents employed in 478 district offices and 419 detached offices (Pet. App. 4a; A. 13-14).[4] Approximately 90 percent of these agents are required by the Company to report to the office to which they are assigned twice a week to attend meetings; the remainder report less frequently because of traveling difficulties. The agents spend the rest of their time working indivdually in the field (Pet. App. 8a, n. 8; A. 19-20).

Approximately 9,702 of the agents in the unit have executed dues checkoff authorizations in favor of the Union.[5] There are no checkoff authorizations in effect at 221 of the Company's offices, to which approximately 2,243 district agents are assigned (Pet. App. 4a; A. 14-15). During 1967, the Company hired 4,315 new agents, while 4,241 agents were either terminated or voluntarily left its employ. During the same period, 2,455 new checkoff authorizations were executed, while 2,352 were cancelled as a result of transfers, terminations, or voluntary revocations. (Pet. App. 5a; A 15-16.)

The Union has mailing lists which include all agents within the unit who have executed dues check-

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[3] "A." refers to the Appendix in the court of appeals, a copy of which has been filed with the Clerk of this Court.

[4] A detached office is administratively related to a particular district office (A. 13-14).

[5] The collective bargaining agreements have provided for the checkoff of union dues, but have not contained union security or maintenance of membership provisions (Pet. App. 4a; A. 12).

off authorizations;[6] in addition to mailing them its monthly newspaper, it communicates with these employees by letter approximately twice a year (A. 21, 23). Through its own efforts, the Union has also obtained the names and home addresses of about 150 non-members employed within the unit (Pet. App. 5a, n. 4; A. 23). It has no record, however, of the names or addresses of the roughly 7,000 other unit employees who are not Union members (Pet. App. 5a; A. 23).

At various times since its selection in 1959, the Union has orally requested the Company to supply it with a list of the names and addresses of the non-union employees in the unit (Pet. App. 5a, n. 3; A. 12). In 1960, it submitted a similar request in writing, explaining: "Such a list is necessary to enable us to accomplish effectively our responsibilities as the bargaining agent, and to bargain effectively for our next contract. There is no practicable way to communicate with these employees other than by mail, because of the geographical expanse of the collective bargaining unit" (A. 12, 31-32). Each of these requests was denied by the Company (A. 12).

On August 23, 1967, during the negotiations which resulted in the current collective bargaining agreement, the Union wrote the Company again requesting that it furnish such a list, pointing out that the

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[6] The Company supplies the Union with a monthly statement of the names and office location of employees who have been added to or deleted from the Company's checkoff authorization list, and also with a similar semi-annual report (Pet. App. 5a; A. 17).

information it would contain was "necessary and relevant to the Union's performance and fulfillment of its statutory functions and duties as collective bargaining representative of all the employees" (A. 29). The letter added that (A. 30):

> * * * [W]ithout such a list, the Union cannot advise all Agents covered by the Agreement as to the benefits offered by the Agreement, cannot gain from them the information and participation necessary and relevant to police and enforce the Agreement throughout the unit or the adherence and support necessary for their representation, or, in general, cannot in any effective manner communicate with the District Agents who are the beneficiaries of its statutory obligations as collective bargaining representative.
>
> * * * [T]his information is, additionally, required and relevant at the present time, when the Union is engaged in collective bargaining with the Company for a new Agreement; and should thus be in a position to inform all the employees represented by it and governed by the Agreement as to the course of the negotiations, and to solicit their understanding and participation in the bargaining process, including their well informed consideration and action upon any proposed new Agreement. * * *

The Company again refused the Union's request, claiming that its policy was not to disclose such information to any organization for any purpose (Pet. App. 6a; A. 12, 21). The Union then filed unfair labor practice charges with the Board, and a com-

plaint issued alleging that the Company's refusal to furnish the information violated Section 8(a)(5) and (1) of the Act (Pet. App. 2a).

On these facts, the Board concluded that the Company's furnishing of the names and addresses of the unit employees to the Union "was necessary and relevant to collective bargaining and the administration of the collective-bargaining agreement" (Pet. App. 6a). In this regard, it found that the Union had advised the Company that "it intended to use this information in order to solicit the employees' views on contract proposals and preferences, inform the employees concerning contract benefits, and encourage employee participation in the policing and enforcing of the collective-bargaining agreement," and that "such purposes must be considered relevant to collective bargaining and to the administration of the collective-bargaining agreement" (Pet. App. 9a).[7] The Board further found the Union lacked any effective means of communicating with non-union unit employees, rejecting the Company's contention that adequate channels of communication were provided by the existing collective bargaining agreement (Pet. App. 7a-8a).[8] Accordingly, it held that the Company

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[7] The Board added: "While we do not dispute the fact that the Union may also use the information obtained for the purpose of recruiting new members, this in no way detracts from our finding that the information is necessary and relevant for the purposes of collective bargaining and the administration of the collective-bargaining agreement" (Pet. App. 9a, n. 11).

[8] Under Article XXIII of the collective bargaining agreement, the Union may maintain a grievance committee in each district (Pet. App. 7a; A. 13, 26-29). The Union has estab-

violated Section 8(a)(5) and (1) of the Act by refusing, on and after August 27, 1967, to furnish the Union with a list of the names and addresses of all bargaining unit employees (Pet. App. 9a).

The Board ordered the Company to cease and desist from the unfair labor practice found, to provide the Union, upon request, with a list of the names and addresses of all employees in the unit, and to notify the Union at periodic intervals of any changes in the information listed (Pet. App. 11a-14a).

On appeal, the court of appeals, with one judge dissenting, sustained the Board's findings as to the relevance of the information sought by the Union and its need therefor, and enforced the Board's order (Pet. App. 15a-30a).[9]

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lished a grievance committee at all offices except the 221 at which no Union members are employed (Pet. App. 7a, n. 6; A. 17). However, there is no contractual authorization for contact between the grievance committee and employees except where such contact is incident to the processing of a grievance (Pet. App. 7a; A. 26-29).

Under Article XVIII of the agreement, the Union is permitted to maintain a bulletin board in each of the Company's local offices and to *post* certain types of notices thereon. However, this provision imposes restrictions upon the content of the notices which may be posted, and it reserves to the Company the right to remove any materials which are not authorized. Moreover, the provision expressly prohibits the Union from using the bulletin boards to *distribute* materials of any kind (Pet. App. 8a; A. 25-26.)

[9] Judge Friendly dissented because, in his view, the record did not support the Board's finding, sustained by the majority of the court, that the Union needed the names and addresses to discharge its collective bargaining function (Pet. App. 30a, 32a).

ARGUMENT

1. The basic question which petitioner seeks to raise—whether an employer's duty to bargain includes "an obligation to provide an incumbent union with a list of home addresses of nonmembers of the union for use by the union for organizational purposes in order to enhance the union's bargaining power" (Pet. 2)—is not presented on this record. The Board found, and the court of appeals sustained its findings, that the Union requested this information because it lacked "an effective means of communication with employees," and that it intended to use it "in order to solicit the employees' views on contract proposals and preferences, inform the employees concerning contract benefits, and encourage employee participation in the policing and enforcing of the collective-bargaining agreement" (Pet. App. 9a). Since collective bargaining and the administration of the agreement in effect are clearly the legitimate function of a bargaining representative,[10] and "[t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties" (*National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, 435-

[10] Indeed, as the court below noted (Pet. App. 29a), "data without which a union cannot even communicate with employees whom it represents is, by its very nature, fundamental to the entire expanse of a union's relationship with the employees."

436),[11] the only issue actually presented is whether there is substantial evidence to support the Board's findings that the Union needed, and intended to use, the information for such purposes. That issue is not one warranting further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

Moreover, the Board's findings were fully justified in view of, *inter alia*, the size of the bargaining unit represented by the Union, the wide geographic dispersion of the members of the unit, the high rate of turnover of employees and Union members, the employees' infrequent contacts with the district offices, and the fact that, at the time of its last request, the Union was then engaged in negotiating a new contract with the Company (*supra*, pp. 2-5).[12] That the Union may also use the information obtained for the purpose of attempting to enlist new members does not require a different conclusion. As the court below pointed out (Pet. App. 29a), there is no necessary inconsistency "between [a union's] informing non-member agents about the benefits it has

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[11] In the light of this decision, which petitioner overlooks, there is plainly no substance to its contention (Pet. 15-16) that the court below has unduly extended the "presumption of relevance."

[12] Contrary to petitioner (Pet. 18-20), the court below did not depart from the standard for determining the adequacy of alternative channels of communication enunciated in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, but merely found that, on the special facts of this case, those channels were not adequate here (see Pet. App. 22a-27a).

obtained and hopes in the future to secure for them and its solicitation of their support." In *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, 675-676, this Court itself pointed out "the union is a service agency that probably encourages membership whenever it does its job well."

2. There is no conflict of decisions. The only other court of appeals which has considered a situation similar to that here reached the same conclusion as did the court below. *Standard Oil Company of California* v. *National Labor Relations Board*, 399 F. 2d 639 (C.A. 9). See also *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, sustaining the propriety of a Board requirement that the employer submit a list of the names and addresses of its employees eligible to vote in a representation election to the unions participating in the election. From the holding in *Wyman-Gordon* it would appear to follow *a fortiori* that a union already "the exclusive bargaining representative of the employees" is entitled to this information so that it "may perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests" (Pet. App. 29a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

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